UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:

NED R. FOX,

Respondent,

and

MR. FOX MARKETING,

Affiliate.

HUDALJ 91-1603-DB
Decided: May 16, 1991

Lorin N. Pace, Esquire
For the Respondent

Marc Rothberg, Esquire
For the Department

Before: WILLIAM C. CREGAR
Administrative Law Judge

INITIAL DETERMINATION AND ORDER

Respondent, Ned R. Fox, and his affiliate, Mr. Fox Marketing, appeal a proposed debarment, dated October 30, 1990, signed by Arthur J. Hill, Acting Assistant Secretary for Housing of the U.S. Department of Housing and Urban Development ("HUD" or "the Department"). This action temporarily suspends[1]

[1]The suspension supersedes a limited denial of participation ("LDP") imposed on June 14, 1990, by the Regional Administrator, HUD Denver Regional Office. This LDP was the second imposed upon

Respondent and proposes that he and his affiliate be debarred from further participation in primary covered transactions and lower-tier covered transactions (*see* 24 C.F.R. Sec. 24.110(a)(1)) as either participants or principals throughout the Executive Branch of the Federal government, and from participating in procurement contracts with HUD for an indefinite period.

The Department's action has two separate bases. First, the Department alleges that Respondent participated in a scheme to induce the purchases of condominium units by offering "buydowns" or purchase incentives which, not having been disclosed to HUD, resulted in the issuance of excessive mortgage insurance commitments. The Department also contends that the failure to disclose the terms of the "buydowns", by necessity, required the knowing falsification of HUD settlement statements. Second, Respondent is asserted to have violated the express terms of a limited denial of participation ("LDP") issued on June 20, 1989, effective for one year, by purchasing two properties covered by Federal Housing Administration ("FHA") insured mortgages during that year.

Respondent, *see infra* p. 9.

Respondent replies that he was introduced to the financing arrangement after it had been devised by others, that his participation was minimal, and he has been unfairly singled out from among a host of equally, if not more, culpable individuals and entities. He also claims that he was advised by his attorney that the June 20, 1989, LDP did not preclude the purchase of FHA insured property in his individual as opposed to his business capacity and that the imposition of an LDP constitutes an "election of remedies" barring the superseding temporary suspension and proposed debarment.[2]

A hearing on the appeal was held on January 22-23, 1991, in Salt Lake City, Utah. Post-hearing briefs were filed on February 28, 1991. Accordingly, this case is ripe for decision.

Statement of Facts

I.

At all times relevant to the acts charged in the Complaint, Boone and Kruckenberg Construction and Design, Inc. ("B&K"), formed in June 1987, owned a condominium project located in Salt Lake City known as Crosspointe Condominiums. A construction loan on the project was held by Valley Mortgage Corp., a subsidiary of Valley Bank. B & K and its subsidiary, Home Buyers Realty, also marketed the Crosspointe units as well as other properties. Tr. pp. 289, 292-293, 310, 326.

Ned Fox is a real estate broker. He has been a licensed broker since 1981 and a real estate agent since 1978. Tr. p 324. He was hired by Home Buyers and B&K on June 7, 1987, to act as the sales manager at Crosspointe. Mr. Fox reported to Jerry Boone of B&K. Tr. p. 290.

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[2]I have not addressed Respondent's contention that the HUD regulation set forth at 24 C.F.R. Sec. 24.713 is unconstitutional, since an administrative proceeding is not an appropriate forum for considering and deciding that type of constitutional argument. *Califano v. Sanders*, 430 U.S. 99, 109 (1977).

HUD's Underwriting Policies

HUD's underwriting policies attempt to balance its mandate to provide affordable housing to the public with the protection of the public fisc. A portion of the public fisc which HUD is responsible for protecting is FHA's insurance fund. As a public insurer, HUD is required to reduce its risk of loss from defaulted loans by requiring that any loss be shared by the purchaser.[3]

Pursuant to its objective of protecting the fund and insuring that purchasers have a stake in their loans, HUD, citing "long standing policy", sent Mortgagee Letter 84-19 in August 1984, to approved mortgagees. The letter states that buyer inducements, with the exception of interest buydowns and items which become part of the realty such as stoves and refrigerators, would reduce the acquisition cost for mortgage insurance purposes dollar for dollar. Buyer inducements are defined as "any item given to a purchaser to promote a sale." Examples include microwave ovens, television sets, free rent and municipal bonds. HUD Ex. 44.

This letter was followed on August 8, 1986, by Mortgagee Letter 86-15 (also sent to HUD approved mortgagees) which put a limitation on seller buydowns. Seller buydowns are defined as "payments for discount points, any type of interest payments, or seller payment of closing costs normally (under local market practice) paid by the buyer. . . ." The letter states that seller buydowns exceeding five percent of the mortgage amount would reduce the mortgage amount dollar for dollar. Homeowner association or condominium fees were also identified as a type of seller inducement requiring a dollar for dollar reduction. HUD Ex. 45, p. 4. On October 22, 1987, the five percent limitation on the amount of seller buydowns was raised to six percent. HUD Ex. 46.

The record does not reflect that these letters were routinely sent to real estate brokers or that Mr. Fox ever received them. Tr. p. 139. However, as discussed below, a preponderance of evidence establishes that he had actual knowledge of their contents.

"Buydowns" affect the amount of insurance which HUD underwrites because they reflect a lower value than is actually being insured. Overinsured

[3]This risk reduction is built into the statutory and regulatory framework. HUD requires an investment by the mortgagor of at least 3 percent of the acquisition cost. 24 C.F.R. Sec. 234.28(a)(1987). See also HUD Handbook 4155.1, Para. 2-5 (May 1983)(HUD Ex. 43).

property both increases the risk of default, and reduces recoupment in the event of a default and foreclosure.[4]

[4]Byron Vaun Bateman, the Chief of Mortgage Credit for the HUD Denver Office explained the computation method used to arrive at the amount upon which the mortgage commitment is based as follows:

> Seller concessions such as association fees are first subtracted from the agreed upon sales price, dollar for dollar. I will call this the first adjusted sales price. The association fee is included in a second computation to determine if the six percent allowance has been exceeded. To the extent that the total concessions exceed six percent in the second computation, another dollar for dollar subtraction results in a second adjusted sales price. The buyer contribution of 3 percent and the amount of the mortgage which HUD will insure is computed based upon the second adjusted sales price. [Tr. pp. 77-86.]

To determine the amount of mortgage insurance, HUD relies upon a Settlement Statement ("HUD-1") which is completed at the final closing. The HUD-1 sets forth the final terms of a real estate sale and is signed by the buyer and seller. On it the purchaser and seller certify that to the best of their knowledge and belief the HUD-1 is a true and accurate statement of all receipts and disbursements made on their account in the transaction. The settlement agent also certifies that it is a true and accurate account of the transaction.[5] At the bottom of the form is a warning that knowingly false statements are subject to 18 U.S.C. Secs. 1001 and 1010. HUD Exs. 8-42.

The HUD mortgage commitment is based upon the amounts reflected on the HUD-1. Since "buydowns" and the assumption of association fees both affect the amount which HUD will insure by reducing the purchaser's stake in the transaction, and are receipts by the purchaser and disbursements by the seller, disclosure of all "buydowns" and assumptions of association fees is required on the HUD-1. HUD Exs. 8-42; Tr. pp. 106, 109, 112.

Thirty-five "buydown" transactions are involved in this case. In each of these transactions, which occurred in 1988 and 1989, the mortgage commitment was issued on HUD's behalf by a HUD approved direct indorsement lender. Under the direct indorsement program, a HUD approved lender is authorized to issue mortgage commitments on behalf of HUD. It does so by signing a worksheet and sending the credit package to HUD. HUD's obligation to insure the mortgage arises when the worksheet is signed. Tr. pp. 136, 139. HUD reviews the credit packages submitted to it by the lender and issues a Certificate of Approval. In all cases the review includes comparison of the HUD-1 and the Earnest Money Agreement. Tr. pp. 72-73, 137. Only ten percent of the credit packages are given a detailed review. Tr. p. 137. Even if a review reveals a problem with the commitment, the contractual obligation to insure the mortgage has come into existence. Tr. p. 138.

Respondent's Participation in the Use of Undisclosed Seller Purchase Inducements

As sales manager Mr. Fox was responsible for managing the sales office. He hired and supervised as many as fifteen sales agents. He was also

[5]Mr. Fox did not sign the HUD-1 certifications.

responsible for negotiating the sales price, including financing arrangements, with prospective buyers. Tr. pp. 144, 151-53, 160, 199-201. These arrangements were subject to approval by B&K.

Potential buyers were shown the condominium units by sales agents. The agents were supervised by Respondent who scheduled their "floor time". Often a buyer expressed an interest in a particular unit, but was unable to make the payments. In those situations the agent took the interested buyer to Mr. Fox who was the "closer". Mr. Fox would offer various inducements to the potential purchaser. These inducements included "buydowns" and assumptions of condominium association fees for a set period of time. As a general rule, the agents did not negotiate the financing terms which were necessary to "close"[6] the deals, *i.e.*, obtain a written offer from a prospective purchaser. "Closing" was Mr. Fox's responsibility.[7] Tr. pp. 239-240. Sales agents attended final closings for "public relations" purposes. Tr. pp. 175, 242. Their attendance at final closings was not essential.

Each agent had a sales kit which included items necessary to effectuate a sale. Included in the kit were the color schemes for the unit and a blank form entitled, "Closing Instructions". When filled out this form specified 1) the amount of the monthly payment, 2) the length of time the monthly payment would be "adjusted", 3) the amount of the monthly "adjustment" and 4) the total amount of monthly adjustments. HUD Exs. 8-42, Tr. pp. 176, 194-197. In addition, when completed, the form would set out the monthly amount of homeowner's fees, the number of months these fees would be paid by the seller, and the total amount to be paid by the seller. When Mr. Fox successfully negotiated the financing agreement, he typed in the blanks on the form and explained these terms to the purchaser.[8] Tr. pp. 218-219, 232, 292.

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[6]Sales agents used the term "close" to refer to the obtaining of an offer. The term is not to be confused with the final real estate closing in which the HUD-1 was executed and the property transferred from the seller to the buyer.

[7]Mr. Fox claims that the agents negotiated the financial terms, and he merely typed them up. Tr. p. 369. His testimony was contradicted not only by the sales agents who testified, and who may have a motive for contradicting him, but by four purchasers who have no such apparent motive. Accordingly, I have credited the testimony of the sales agents and purchasers that Mr. Fox negotiated the financial arrangements.

[8]The typewriter and Mr. Fox's phrasing were recognized and identified by John T. Alexander, the B&K Operations Officer, who was familiar with both. Tr. p. 292.

Four purchasers testified without contradiction that Mr. Fox personally negotiated their financing. They learned from him about the buydown arrangement consisting of monthly subsidy checks and/or the assumption by the seller of association fees..[9] Tr. pp. 144, 151-153, 160, 199-201. One purchaser, Gail Burdick, accepted an arrangement suggested by Mr. Fox by which, if she agreed to obtain FHA financing, she would be issued a lump sum payment in lieu of a monthly subsidy. Tr. pp. 199-201, 203.

The financing arrangements, were set forth in the "Earnest Money Sales Agreement" which constituted the purchaser's offer. Mr. Fox took this document to Mr. Boone at B&K for acceptance. Mr. Fox's signature appears next to the words, "sent by" on the agreements. HUD Exs. 8-42. Although the blanks on the "Closing Instructions" form were often typed in by Mr. Fox at the same time he typed the Earnest Money Agreement, the Earnest Money Sales Agreements do not contain the buydown and association fee payment schedules contained in the "Closing Instructions". Tr. pp. 177, 191, 232, 292; Govt. Exs. 8-42.

After approval by B&K, the Agreement was sent to the direct indorsement lender and subsequently to HUD. However, the "Closing Instructions" were sent neither to the lender nor to HUD. Tr. p. 123.

The lender prepared the HUD-1s based on the Mr. Fox's instructions. Tr. p. 272. Although the HUD-1s disclose buydowns to the extent allowed by HUD underwriting requirements before triggering a dollar for dollar reduction in the amount insured by HUD, they do not reflect the buydown and association fee inducements set forth in the "Closing Instructions". HUD Exs. 8-42, Tr. p. 112. Accordingly, the HUD-1s are false.

[9]A sales agent, Robert Chatwin, explained the financing arrangements to the fifth purchaser who testified, Michael Marquardt.

Mr. Fox was present at most of the final closings on the properties. During the typical closing a representative from the title company read the information set forth on the HUD-1. Mr. Fox voiced no objection or disagreement with the figures..[10]

At some time during these closings, and outside of the presence of the title company representative, Mr. Fox would explain to the purchaser the buydown terms consistent with the information set forth on the typed-in form entitled "Closing Instructions".[11] One purchaser, Sandra Adamson, expressed concern to Mr. Fox at the final closing on her condominium that the amounts reflected on the HUD-1 were higher than what she had been led to believe. He stated: "Don't worry about the figures." Tr. pp. 153-154. In response to her subsequent complaint following her receipt of the payment book from the lender, he told her that she would only pay $400.00 the first year and that she would not have to pay association fees for the first year. Tr. pp. 151-53.[12]

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[10]Mary Ann Mackley, the title representative for First American Title Company of Utah, attended at least 32 final closings out of the 35 involved in this case. Mr. Fox was present at most of them, including those involving the five purchasers who testified at the hearing. Ms. Mackley reviewed the HUD-1s in his presence. Generally, he had no objection to the figures on the HUD-1s. Tr. pp. 313-314.

[11]Betty Shetter, one of the Crosspointe sales agents, opined that the title representatives knew of the side agreements. Tr. p. 237. Mary Ann Mackley (*see supra* n.10) denied knowledge of any side agreements. Tr. pp. 319-320.

[12]The records of the Adamson purchase reflect that the total monthly disclosed buydown as reflected on the HUD-1 was $1506.72. HUD Ex. 8, p. 6, ln. 810. The additional buydown as reflected on the "Closing Instructions", but not on the HUD-1, was $2,063.44. The buydown was separated into monthly payments of $105 the first year and $46.12 the second year. In addition, the association fees, also not disclosed on the HUD-1, amounted to $1,992. HUD Ex. 8, pp. 5-6, 11.

Within a few days after each closing, John T. Alexander, the B&K Operations Officer, sent written instructions to Valley Mortgage to issue two checks. The first check was made out and sent to the Crosspointe Homeowners Association. It paid the association fees specified in the "Closing Instructions" for each of the sales. Tr. pp. 304-305. The second check paid for the buydown. Mr. Alexander deposited the second check in an escrow account established for this purpose initially at Valley Mortgage and, subsequently, at Associated Title Company. He supplied Valley Mortgage or Associated Title Company with the name and address of the purchaser and the amount of each monthly check.[13] Associated would then send a monthly check to the purchaser for the prorata portion of the buydown. *See, e.g.*, HUD Ex. 8, pp. 12-13, 16-38; Tr. pp. 304-307, 309.

According to the uncontradicted testimony of Christine Allred, one of the Crosspointe sales agents, Respondent explained the buydown enticement to the sales agents at weekly sales meetings. Tr. pp. 220, 240-241. As he explained it, a full disclosure was to be made of the FHA loan payments. She also understood from his explanation that the buydown was to be "in addition to" the (previously disclosed) FHA loan payments. Tr. p. 241.

Respondent was present at a sales meeting held at Crosspointe[14] in which Mary Lee Jones, a Loan Officer from American Concord Mortgage Company, explained "what HUD allows as a seller concession" and that anything above the concession would reduce the sales price. Tr. pp. 268-269.

Since she happened to live in one of the units, Ms. Jones reviewed loan applications at Crosspointe. On several occasions she provided estimates of the monthly mortgage payment which surprised the potential buyer who had been led to believe that the payment would be lower. Respondent or one of the sales

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[13]Mr. Fox also informed Associated Title Company of the amount of compensation he should receive. The compensation was reflected on the HUD-1 and was based upon how much he was owed at the time. It did not reflect his commission for the particular sale. Tr. pp. 328, 377-378. He received a check issued by Associated Title Company to either Ned Fox Marketing or Darinco, a corporation set up for tax purposes. Darinco was not named as an affiliate in these proceedings. Respondent does not take issue with the Department's claim that Mr. Fox Marketing is Respondent's affiliate.

[14]The record does not reflect the date of this meeting. However, since Ms. Jones was employed by American Concord at the time, it must have been subsequent to June 1988, the date she began her employment with that company. Tr. p. 262.

agents, having been informed of the concern, took the concerned buyer out of the room. The buyer returned and signed the loan application. Tr. pp. 263-265. In the Spring of 1989, she informed Respondent that the loans were overvalued. Respondent explained to her that he had $10,000 to $12,000 to work with for each unit. He explained how the buydown worked. Tr. pp. 266-268. She stated: "[A]nd we knew and he knew it was illegal."[15] Tr. p. 267.

[15]Having observed her demeanor, I find Ms. Jones to be a forthright and credible witness.

At the time of the 35 sales in question, Respondent, by his own admission, was familiar with what he referred to as the "subsidy program". Tr. pp. 332, 359-362. He explained its rationale.[16] Respondent in his deposition admits to having "implemented all the programs that [were] given to [him] as sales manager of Crosspointe," including the buydown with the monthly subsidies. Tr. p. 396.

Respondent fired sales agent Betty Shetter "right after" she had a discussion with Mr. Boone of B&K in which she told him that she believed that "double buydowns" were illegal. Tr. pp. 215-216. When she asked why she was being fired, Mr. Fox replied, "you know". Tr. p. 216.[17]

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[16]According to Respondent, a seller, faced with a slow market and declining prices, should not visibly reduce the sales price of condominium units. To do so generates a reaction on the part of those who have already purchased units at the higher prices. Respondent claims that the sellers "start walking", leaving the units to be foreclosed and ending up in HUD's inventory. He refers to this phenomenon as the "HUD cancer". Tr. p. 361.

[17]Respondent's stated reason for firing Ms. Shetter was that she was "disruptive" and failed to perform adequately. Tr. p. 402. His claim of her deficient performance is undocumented and unsupported. Ms. Shetter's purported poor performance is belied by the fact that Mr. Fox was compelled to rehire her at Mr. Boone's direction on May 25, 1989. Mr. Fox's statement that she knew the reason for her firing indicates that he did not care to discuss it. The timing of the unexplained firing and the lack of support for the claim that her performance was deficient establish that Mr. Fox fired her, at least in part, because of her complaint to Mr. Boone. Accordingly, I find Respondent's testimony on this point to lack credibility. Having observed Ms. Shetter's demeanor, I find her testimony to be forthright, credible, and consistent with other evidence in the record.

The purchaser inducements not disclosed on the 35 HUD-1s total $178,108. HUD overinsured mortgages on these 35 transactions in the amount of $289,725. HUD Ex. 47.

HUD Sanctions Imposed on Others

The record reflects that HUD imposed sanctions against others involved in these 35 transactions. These actions include LDPs and suspensions pending debarment of B&K, Home Buyers Realty, and its owners, Mr. Boone and Allen Kruckenberg; and a demand by HUD's Mortgagee Review Board[18] that Valley Bank compensate HUD for any losses sustained by it. Tr. pp. 39-42, 46-49, 53-55. Decisions to impose sanctions against Associated Title Company and the sales agents[19] await the outcome of pending investigations. Tr. pp. 52, 56-59, 62-63.

[18]The Mortgagee Review Board is delegated exclusive authority by the Secretary to impose sanctions against HUD approved lenders. 24 C.F.R. Secs. 24.200(e)(3); 25.2.

[19]As a result of her involvement with these sales, sales agent Christine Allred received the sanction of an LDP for three months which expired in July 1990. Tr. pp. 253-254.

II.

Respondent received an LDP dated June 30, 1989, effective for one year in a geographic area including the State of Utah.[20] The LDP prohibited him from "participating in all programs under the jurisdiction of the Department's Assistant Secretary for Housing," including becoming the "purchaser of a HUD-held property or any property with a HUD-insured or Secretary-held mortgage. . . ." HUD Ex. 1.

Respondent purchased two Crosspointe condominium units which were subject to FHA mortgages. These properties were deeded to him on September 21, 1989. HUD Exs. 2-5; Tr. pp. 61-62, 69. Respondent purchased the two condominium units knowing that he was precluded from doing so by the LDP.[21]

On June 14, 1990, Respondent was issued a second one year LDP by the Regional Administrator, Denver Regional Office for violating the first LDP. Respondent appealed the second LDP. By letter dated October 30, 1990, Arthur J. Hill, Acting Assistant Secretary for Housing/Federal Housing Commissioner initiated the present action. The temporary suspension supersedes the second LDP.

Discussion

Grounds for Debarment and Suspension

[20]The LDP was based upon evidence that Respondent signed a statement that he intended to occupy a property. Upon receiving a warrantee deed from the owner, Respondent immediately deeded the property to B&K. Respondent appealed the LDP, but subsequently withdrew his appeal because he could not afford to pursue it. Tr. p. 381.

[21]Respondent's explanation that he purchased the condominiums on advice of his attorney is not credible. His deposition, read into the hearing record during cross examination, states that he had no knowledge that his attorney had ever contacted HUD. Tr. p. 389. On redirect examination he stated that his attorney had been in "constant contact" with HUD but that he only learned of her contact with HUD subsequent to his deposition. Tr. p. 401. I do not accept his explanation. First, the language of the LDP contains an explicit preclusion against becoming the purchaser of any property with a HUD insured mortgage. Respondent's reference to his attorney's "constant contact" with HUD implies that someone at HUD furnished an interpretation to his attorney which permitted the purchases despite this express language. Yet, there is no written or oral evidence of such an interpretation having been given by anyone at HUD despite the importance of such evidence in establishing this claim. Second, it is unlikely that Mr. Fox, whom I find to be an intelligent individual, would not learn the basis for any advice. If I am to credit his story, I must accept his testimony that he blindly accepted his attorney's opinion without knowing that she had ever contacted HUD or even inquiring if she had. I do not.

The Department relies upon the causes set forth in 24 C.F.R. Secs. 305(b), (d), and (f) for the proposed debarment, and 24 C.F.R. Sec. 24.405(a) for the suspension. It contends that Respondent's acts evidence repeated wilful misconduct warranting the imposition of an indefinite debarment.

Respondent does not dispute either the Department's contention that the HUD-1s did not reflect the amounts of "second" buydowns and the payment of association fees by the seller, or that these disclosures were required on the HUD-1s. Rather, he contends that he was merely responsible for running the sales office and did not actually negotiate the transactions, that he was introduced to the scheme well after it had been established by others, that it was well known to others including various lenders, and that he has been selectively and unfairly prosecuted. He also claims that because the scheme was such a commonly accepted way of doing business, that he did not even realize he was doing anything wrong until HUD began its investigations. Regarding the purchase of FHA insured properties, Respondent contends that the LDPs constitute an "election of remedies" barring the superseding temporary suspension and proposed debarment. He also asserts that he purchased the properties only after receiving favorable advice from his attorney.

Section 305(b) provides that a debarment may be imposed for:

> Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as:
>
> (3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction.

Subsection (d) provides that debarment may be imposed for:

> [a]ny other cause of so serious or compelling a nature that it affects the present responsibility of a person.

This subsection goes on to enumerate specific grounds relating to violation of various statutes, regulations or agreements designed to prohibit or remedy discrimination, and statutes, regulations or agreements relating to conflicts of interest.

Subsection (f) provides that a debarment may be imposed for:

> material violation of a statutory or regulatory provision or program requirement applicable to a public agreement or transaction including applications for...insurance or guarantees, or to the performance of requirements under a...final commitment to insure or guarantee.

Section 24.405(a) and 24 C.F.R. Sec. 24.400(b)(2) provide that a suspension may be imposed upon adequate evidence that grounds for debarment exist under Section 305 and that immediate action is necessary to protect the public interest.

The record establishes that Respondent knowingly and wilfully participated in a scheme which caused HUD to overinsure mortgages. This scheme was effectuated by the knowing submission of false HUD-1s.

Respondent's conduct evidences his extensive participation in a scheme involving the use of undisclosed seller purchase inducements by B&K. The testimony of sales agents, Robert Chatwin, Betty Shetter, Christine Allred, the Loan Officer for American Concord, Mary Lee Jones, and four purchasers, establishes that, while the sales agents laid the ground work for the sales, Mr. Fox was the deal "closer". As "closer" he was responsible for negotiating the terms of the financing. These terms included the use of undisclosed buydowns and the undisclosed payment of association fees. He typed in the terms of the buydowns and association fees on the "Closing Instructions" blank form. Although agreements which he negotiated were subject to approval by B&K, he was B&K's principal negotiator. Illustrations of the extent of his role in negotiating financing arrangements are provided both by his offer to pay Ms. Burdick a lump sum payment in lieu of a monthly subsidy and his statement to Ms. Jones that he had $10,000 to $12,000 to work with. At the final closings Mr. Fox made no comments while the HUD-1 was being explained, but in meetings following the explanation of the HUD-1 and while outside the presence of the title company representative, he reviewed the terms of the buydown and association fee inducements with the purchasers.

The record also establishes that Mr. Fox knew he was violating HUD minimum investment policies and disclosure requirements. HUD policies regarding limitations on sales inducements were explained by Ms. Jones at a sales meeting held sometime after June 1988 at which Respondent was present. He explained the double buydown scheme to sales agents at sales meetings, and, on one occasion, to Ms. Jones upon being questioned by her. She testified

that at this occasion she formed the opinion that he knew the use of undisclosed purchaser inducements was illegal. Buyers who noted payment discrepancies while being interviewed by Ms. Jones were taken aside by Respondent and returned satisfied with the arrangements which he explained to them. During the final closing on her condominium, one purchaser, Ms. Adamson, questioned the discrepancy between the payments as set forth on the HUD-1 and what she understood her payment to be, and was told by Mr. Fox not to worry about the figures. Later, she questioned Respondent about the amount of monthly payments in the coupon book she received from the lender. He told her that she need only pay the $400 the first year. Mr. Fox was silent during the discussion of the contents of the HUD-1s during final closings, knowing that the figures they contained were false. Finally, Respondent does not dispute the Department's contention that he was aware of both HUD's limitations on seller purchase inducements and the requirement to disclose any inducements exceeding these limitations. He testified that he was aware of what he referred to as a "subsidy program" and even attempted to justify its use.

The record also establishes that Mr. Fox knowingly purchased two properties subject to FHA mortgages while subject to an LDP which prohibited him from doing so. His explanation that he did so on advice of his attorney lacks credibility.

The record reflects that Mr. Fox was not the only individual or entity sanctioned in connection with the 35 transactions involving the nondisclosure of seller inducements. Possible sanctions against others await the outcome of investigations. There is not even a shred of evidence that the sanctions which have been taken or which have been proposed are disproportionate to the extent of the alleged involvement of the individual or entity or the seriousness of the alleged infractions. Accordingly, Respondent has failed to demonstrate that he has been unfairly singled out.

Respondent has cited no cases or other authority directly supporting his contention that the Department waived its right to pursue the present action by initially electing to impose the second LDP for having violated the terms of the first LDP. HUD regulations specifically provide that the issuance of an LDP does not affect the right of the Department to issue a subsequent suspension or propose debarment. 24 C.F.R. Sec. 24.710(b). A suspension following the issuance of an LDP supersedes the LDP. 24 C.F.R. Sec. 24.713.

Grounds for debarment have been demonstrated by preponderant

evidence under 24 C.F.R. Sec. 301(b)(3) which authorizes the imposition of a sanction for a wilful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction. Although Respondent may not have originated the use of undisclosed purchaser inducements, his extensive, knowing participation in a scheme which resulted in overinsured mortgage commitments constitutes a wilful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction, *i.e.*, the permissible loan to value limitations set forth in 12 U.S.C. Sec. 1715(y); 24 C.F.R. Sec. 234.27; HUD Handbook 455.1; and Mortgagee Letters 84-19, 86-15, and 87-35. In addition, this scheme had as a principal component the knowing falsification of HUD-1s. Although he did not sign the HUD-1s, by not disclosing seller purchase inducements on these forms either in his contacts with the lender or at the final closings, Respondent knowingly and extensively participated in the falsification of these documents. His participation and nondisclosure also constitutes a wilful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction, *i.e.*, the requirement expressly stated on the HUD-1 itself that it accurately reflect all receipts and disbursements, and that it is a true and accurate account of the transaction. Knowing, wilful falsification of this document is a crime. 18 U.S.C. Secs. 1001, 1010.

For the reasons set forth above with regard to 24 C.F.R. Sec. 305(b)(3), the Department has proved by preponderant evidence that there are grounds for debarment under 24 C.F.R. Sec. 24.305(f). For the reasons set forth with regard to 24 C.F.R. Sec. 24.305(b)(1) and (3), it has also proved grounds for suspension under 24 C.F.R. Sec. 405(a) and that a suspension is justified to protect the public interest. However, the Department has not demonstrated a violation of 24 C.F.R. Sec. 305(d). Subsection (d) applies to those situations where there has been a violation sufficient to demonstrate present irresponsibility which is not specifically enumerated in that subsection, but is sufficiently similar to the conduct listed in the subsection as to be comprehended by it. The violation of various statutory and regulatory requirements and "falsification" do not fall within grounds similar to conduct which relate to discrimination or conflicts of interest.

Lack of Present Responsibility

The existence of a cause for debarment does not necessarily require that a respondent be debarred. HUD must also determine whether debarment is necessary to protect the public interest. *See* 24 C.F.R. Secs. 24.115(a), (b) and (d). The debarment process is not intended as a punishment, rather, it protects governmental interests not safeguarded by other laws. *Joseph Constr. Co. v.*

Veterans Admin., 595 F. Supp. 448, 452 (N.D. Ill. 1984). These governmental and public interests are safeguarded by precluding persons who are not "responsible" from conducting business with the Federal government. *See* 24 C.F.R. Sec. 24.115(a). *See also Agan v. Pierce*, 576 F. Supp. 257 (N.D. Ga. 1983); *Stanko Packing Co., Inc. v. Bergland*, 489 F. Supp. 947, 948-49 (D.D.C. 1980).

"Responsibility" is a term of art which encompasses business integrity and honesty. *See* 24 C.F.R. Sec. 24.305; *Gonzalez v. Freeman*, 334 F.2d 570, 573 & n.4, 576-77 (D.C. Cir. 1964). Determining "responsibility" requires an assessment of the current risk that the government will be injured in the future by doing business with a respondent. *See Shane Meat Co., Inc. v. U.S. Dep't of Defense*, 800 F.2d 334, 338 (3d Cir. 1986). That assessment may be based on past acts. *See Agan v. Pierce*, 576 F. Supp. at 261; *Delta Rocky Mountain Petroleum, Inc. v. U.S. Dep't of Defense*, 726 F. Supp. 278 (D.Colo. 1989).

The record establishes that Respondent continues to pose a present risk to the Department and the public. He has knowingly violated HUD program requirements on numerous occasions. In the first incident he was charged with having deeded property to B&K immediately following their sale after signing a statement that he intended to be the owner-occupant of the property.[22] For this he was sanctioned with an LDP. He then proceeded to violate the terms of the LDP by knowingly purchasing two properties subject to FHA insured mortgages. His knowing participation in the scheme to sell 35 properties utilizing undisclosed purchase inducements resulted in HUD overinsuring properties, and, accordingly, placing the public fisc at risk in the amount of $289,725. Moreover, the fact that his actions would have necessarily resulted in receipt of a brokerage fee and benefit to him to the detriment of the government demonstrates a lack of integrity

[22]Respondent claims someone with his power of attorney bought and sold the property while he was in California and that he could not afford to appeal the resulting LDP. Tr. pp. 380-381. His claim that the LDP was wrongfully imposed became final without ever having been litigated. Accordingly, it constitutes a binding final determination.

and honesty.[23] Finally, he fails to offer evidence to contradict a finding of present irresponsibility. For these reasons, the record establishes that Respondent lacks present responsibility.

As the evidence supports a finding of a lack of present responsibility, debarment of Respondent Fox is an appropriate remedy. Consequently, Mr. Fox Marketing, as an affiliate, is also subject to debarment.

[23]Although Respondent's commission as reflected on each HUD-1 was not necessarily earned for that particular sale, it is clear that he received a commission for each property sold. Tr. p. 391.

The Appropriate Sanction

The seriousness of Respondent's actions, and any mitigating factors must be considered in any debarment determination. 24 C.F.R. Secs. 24.115(d), 24.300 and 24.320(a). Upon examination of these criteria, I find that a debarment for an indefinite period is appropriate. The seriousness of Respondent's actions indicating a lack of present responsibility justifies debarment and supports imposition of an infinite debarment period. The seriousness of his conduct is established by its wilfulness, frequency (including his violation of the terms of a HUD imposed sanction) and the extent of the resulting overinsurance.

I have considered Respondent's testimony that the use of undisclosed inducements did not originate with him and, for purposes of determining an appropriate sanction, have conditionally accepted his contentions both that others were involved in the scheme and that the scheme was "common knowledge". Tr. p. 376. While this evidence tends to mitigate Respondent's misconduct, I have concluded that it is overwhelmed by other evidence which tends to demonstrate that he has learned little or nothing from this experience and, as a result, poses a risk extending into the foreseeable future.

Respondent has not demonstrated that he has learned from this experience. As mentioned above, he already knowingly violated the terms of one sanction. During his testimony he went so far as to attempt to justify what he did in order to prevent an occurrence of "HUD cancer". Concluding his direct examination, he was asked by his counsel how he felt about his involvement at Crosspointe. He states: "Well, I feel that what we were doing at Crosspointe, the programs that Valley Bank put down was an excellent program in order to spur the market in Salt Lake City to get the condominiums sold and to keep that project moving . . . And I look at it this way: If they hadn't done something we may had [sic] another bank here in Salt Lake in financial trouble." Tr. p. 385.

While admitting to the acts, Respondent takes the position that because everyone was engaged in the scheme he did not know it was wrong. That Mr. Fox, an intelligent and experienced real estate broker could honestly believe that he could engage in a scheme which involved transmitting false financial information to HUD is simply not credible. It is one more indication of the risk he poses. If true, he poses a risk to the public from a lack of competence. If not true, it is another indication of a lack of honesty and forthrightness.

HUD regulations provide that the period of debarment based upon causes

set forth in 24 C.F.R. Sec. 24.305[24] "generally should not exceed three years." 24 C.F.R. Sec. 24.320(a)(1). However, under the circumstances of this case, the seriousness of Respondent's misconduct, combined with evidence that his lack of present responsibility shows no signs of abating, supports a debarment for an indefinite period.

Conclusion and Order

Under the circumstances presented, I conclude that the suspension and debarment of Respondent, Ned R. Fox and his affiliate, Mr. Fox Marketing, is based on adequate cause and is in the public interest. I conclude that a debarment for an indefinite period is necessary to protect the public from similar occurrences. Upon consideration of the public interest and the entire record in this matter, I conclude that good cause exists to suspend and debar Respondent and his affiliate from further participation in primary covered transactions and lower tier covered transactions as either a participant or principal at HUD and throughout the Executive Branch of the Federal government and from participating in procurement contracts with HUD for an indefinite period.

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WILLIAM C. CREGAR
Administrative Law Judge

Dated: May 16, 1991

[24]With the exception of Subpart F dealing with a drug free workplace.